No. 14,650

United States
COURT OF APPEALS
for the Ninth Circuit

GENERAL CASUALTY COMPANY OF AMERICA,
a corporation

Appellant

v.

SCHOOL DISTRICT #5, BAKER COUNTY,
STATE OF OREGON ex rel S. C. LYONS,

Appellee

BRIEF OF APPELLANT

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JURISDICTION

This is an appeal from a final judgment (R. 15) entered after a trial without a jury by the United States District Court for the District of Oregon in favor of the Relator in the sum of $2,859.61, plus interest from July 10, 1952, $1,000.00 attorney fees and $178.00 costs, against Appellant as surety for James Lundgren dba Pacific Construction Company, a citizen and resident of the State of Washington, who was not served with process and did not appear.

The Pretrial Order shows that Appellant is a corporation of the State of Washington and is a citizen and resident of that State; Appellee is a citizen and resident of the State of Oregon; and the matter in controversy exceeds the sum of $3,000.00 exclusive of interest and costs (R. 4).

The District Court had jurisdiction of the cause under the provisions of 28 U.S.C.A. Sec. 1332 (a) (1).

This Court has jurisdiction to review by appeal the judgment of the District Court under the provisions of 28 U.S.C.A. Sec. 1291. The case is not one in which a direct review may be had in the Supreme Court under 28 U.S.C.A. 1252 or 1253.

STATEMENT OF THE CASE

The action is for recovery of a balance claimed by Relator for sheet metal work performed between November 6, 1951, and July 3, 1952 (R. 7, 12) by Relator as a subcontractor (R. 6, 12) for Lundgren as general contractor on a high school and swimming pool at Baker, Oregon (R. 4, 11) for which Lundgren had previously paid Relator $10,780.60 (R. 5, 12).

The Pretrial Order set forth these issues of fact to be determined by the Court (R. 8):

1. Was there an agreement between the Parties? If so, what was it?
2. What labor and material did Relator furnish defendant Lundgren at his request?
3. What was their reasonable value?

4. Is Relator entitled to recover an attorney fee? If so, in what amount?

Relator testified that he was employed early in November, 1951, to build and install a smoke vent in a high school being constructed by Lundgren at Baker, Oregon (R. 22), and shortly thereafter to finish the rest of the sheet metal work on the school (R. 23). He purchased materials and performed labor during November and started billing Lundgren (R. 24).

His first bill (Ex. 14-A-1) was for a lump sum of $2,700 (R. 24) and the first payment he received was $800.00 on December 12, 1951 (R. 25, 26). There was correspondence (Exs. 14-A-1 and 2, 17, 18-A and B) and discussion between Relator and Lundgren in connection with this and subsequent billings regarding which (R. 24-27) Relator's testimony is confused and contradictory. Relator testified, however, that Exhibit 14-A-2 set out the terms under which he "had labored on the job and was continuing to labor" (R. 24). This was denied by Lundgren (R. 37-39) (Ex. 18-B).

There was no evidence regarding the labor and materials furnished by Relator except Relator's bills to Lundgren (Exs. 14-A, B and C), the time records kept by his employees (Ex. 15) and his bookkeeper (Ex. 19-A), social security tax returns (Ex. 16), State Industrial Accident returns (Ex. 1) and other internal records maintained by the Relator (Exs. 9A, A-1, B and C), his original summary of claim (Ex. 21) and his revised summary of claim (Ex. 25). These records are in complete contradiction each with the other (see schedules I and II).

Some of the discrepancies in Relator's records were brought out during his cross-examination. As a result Relator acknowledged that his claim of $5,303.79 was excessive and that his billings to Lundgren contained substantial overcharges which he had known about before going to trial (R. 29-30). Thereupon, the Court ordered the trial adjourned to give the Relator an opportunity to eliminate from his claim the items he knew to be unjustified (R. 30). The Pretrial Order was amended (R. 47-48, Ex. 25) to reduce Relator's claim to $3,999.58. The Court found even this amount excessive and allowed Relator only $2,859.61 (R. 14).

The contentions and findings regarding compensable time are shown in the following table:

	Employee's Time	*Relator's Time*	*Dollar Amount*
Original Pretrial Order (R. 47-48) (Ex. 21)	1423½ hours	975½ hours	$9727.87
Amended Pretrial Order (R. 7) (Ex. 25)	1285½ "	877½ "	8769.37
Trial Court's Finding (R. 13)	1169 "	774½ "	7869.00

During the recess at which the Pretrial Order was amended, the parties stipulated (R. 48) that if Relator should "recover the amount originally set forth in the Pretrial Order, $1,000.00 is a reasonable amount as attorney's fees." Relator recovered less than fifty-four per cent of "the amount originally set forth in the Pretrial Order." Nevertheless, the trial Court awarded Relator $1,000.00 attorney fees and $178.00 costs, or a total of $4,037.58, which is within one per cent of the $3,999.58 claimed by Relator in the amended Pretrial Order.

APPELLANT'S CONTENTIONS

1. There is no evidence to support the finding of the District Court as to the number of hours for which Relator is entitled to compensation.

No evidence of time spent was offered except the Relator's own records (Exs. 1, 9-A, A-1, B and C, 14-A, B and C, 15, 16, 19-A and 25). Hence, the credibility of witnesses is not involved.

The obvious mutual contradiction among Relator's records (schedules I and II) led to their complete rejection by the trial Court, which found a lower number of hours than appears in any of them. As a result, there is *no* evidence as to *any* amount of time on which the Court could have based this finding. But if there were a basis, it was not disclosed by the District Court as required by Rule 52 (a) F.R.C.P.

2. The District Court's award of $1,000.00 attorney fee is contrary to the stipulation (R. 48) that $1,000.00 would be a reasonable attorney fee if Relator should recover $5,303.79, the amount he originally claimed, not 54% thereof, which is what the Court allowed. The amount allowed is excessive, particularly in view of said stipulation.

3. The findings of the District Court as to attorney fees, the amount of time for which Relator is entitled to be compensated, and the rate of such compensation are not within the issues submitted, are not supported by, but are clearly contrary to, the evidence and do not support the judgment rendered.

4. The findings of the District Court are clearly erroneous and should be reversed.

ARGUMENT

POINT I

THE COURT ERRED IN FINDING RELATOR ENTITLED TO $7869.00 FOR LABOR

The Court found (R. 13) that Relator furnished materials to Lundgren at an agreed price of cost plus 20% with the exception of certain doors which were furnished at the rate of cost plus 10%. It made no finding of any agreement regarding compensation for labor, but found merely

> "that Relator furnished labor to defendant James Lundgren at the rate of 774½ of his own time at $4.50 an hour and 1169 hours of his employees' time at $3.75 an hour." (R. 13)

The Court's omission to make any finding as to an agreement regarding labor is striking because that is the only item in finding No. V (R. 13) as to which the Court failed to find an "agreement". Equally striking is the fact that the number of hours for which the Court found Relator entitled to compensation finds no support whatsoever in the record.

All the evidence of time spent was documentary. Relator identified the individual time record books in which each employee made his own entries (Ex. 15). He identified the sheet (Ex. 19-A) onto which these entries, chargeable to Lundgren, were taken off by Relator's

bookkeeper. The bills which Relator rendered to Lundgren (Exs. 14-A and C) he said were taken off this document (Ex. 19-A). Nowhere in any of them is there a figure or combination of figures which corresponds to the trial Court's findings.

Schedule I is a columnar comparison of the figures appearing in these documents. It reveals so many discrepancies between them that it would have been impossible for anybody to prepare any one of them on the basis of any of the others.

On cross-examination, Relator admitted his claim was excessive and that his bills contained overcharges (R. 29-30) which he had known about before going to trial. The Court ordered a recess to enable him to restate his claim (Ex. 25). The Pretrial Order was amended (R. 48) and the trial resumed on the basis of the revised Pretrial Order. This revision merely substituted one set of contradictory records for another, as an examination of the single item of smoke vent will clearly disclose (see Schedule II).

The amount of time actually charged to smoke vent on Relator's own internal records is 354½ hours of his own time and 566½ hours of his employees' time. Of this, 27 hours of his employees' time and 24 hours of his own time are accounted for on Exhibit 19-A during the period June 4 to July 3, 1952, for which no interim bill was submitted. But the bulk of the time was developed prior to June 4, 1952, and is reflected not only on Exhibit 19-A but also on the Relator's interim statement (Ex. 14-A). Thus, for the period November 6, 1951, to

April 25, 1952, Exhibit 19-A shows 512½ hours of employees' time and 306 hours of Relator's time, which corresponds quite closely to the number of hours charged to smoke vent on Relator's interim bills, namely: 508½ hours of employees' time and 341 hours of Relator's time.

In spite of the fact that Exhibit 19-A shows an additional 27 hours of employees' time and an additional 24 hours of Relator's time charged to smoke vent after the last interim bill period, Relator's final bill, Exhibit 14-C, of $3914.51 for smoke vent, charges not 539½ hours but 442 hours of employees' time and not 340 hours but 331½ hours of Relator's time. Thus, in his final bill he allocated to the smoke vent item 97½ hours less of employees' time and 8½ hours less of his own time than he should have by his own internal records.

But when he had the opportunity during the course of the trial (R. 29-31) to review his billings again, the result, as shown in Exhibit 25, is an understatement to the extent of 147 hours of employees' time and 30½ hours of his own time. There is only one possible explanation for this strange conduct and that is: Relator himself recognized that his time records so grossly overstated the amount of time attributable to the smoke vent that he felt obligated to reduce them; and by the same token his time records fell so far short of supporting his billings on other items that he felt free to attribute to them the 147 hours of employees' time and 30½ hours of his own time which had been entered on his records as having been spent on the smoke vent (see Schedule II).

SCHEDULE I

A Comparative Schedule of Exhibits 15, 19A, 14A, 9A, B, C,
for Hours of Employees

Period	Employee	Schedule I Page	1 Total Hours Paid by Relator Exhibit 9	2* Exhibit 15 Employees' Weekly Time Book: Hours Not Entered or Explained	3 Exhibit 15 Employees' Weekly Time Book: Total Entered	4 Exhibit 15 Employees' Weekly Time Book: "Worked for Others"	5 Exhibit 15 Employees' Weekly Time Book: "Baker"	6 Listed as Chargeable to Defendent on 19A	7 Charged to Defendent on 19A After Revision	8 Charged on Interim Billings 14A (2 - 7)
November, 1951	Gilkey	I - 1	66 1/2	↓ 6	60 1/2	5	55 1/2	57	47 1/2	
December, 1951	Gilkey	I - 3	19	- 9	28	2	26	25 1/2	24	
November, 1951	Griffith	I - 2	162 1/2	- 11 1/2	174	27	147	131	124 1/2	
To December 18, 1951	Griffith	I - 4	90	↓ 9	81	8	73	33	77	
Totals for billing of December 31, 1951			338	- 5 1/2	343 1/2	42	301 1/2	296 1/2	273	(2) 298
December 19 - 27	Griffith Alternate A	I - 4	55 1/2	- 1 1/2	57	5	52	56 1/2	52	
January , 1952	Griffith	I - 5	224 1/2	- 4	228 1/2	4	224 1/2	217	215 1/2	
Totals for billing of February 1, 1952			280	- 5 1/2	285 1/2	9	276 1/2	273 1/2	267 1/2	(3) 281 1/2
February, 1952	Griffith	I - 6	145	- 2	147	16	131	144	111	
February, 1952	Bumgardner	I - 7	116 1/2	↓ 82	34 1/2	-	34 1/2	91 1/2	91 1/2	
Totals for billing of February 29, 1952			261 1/2	↓ 80	181 1/2	16	165 1/2	235 1/2	202 1/2	(4) 203
March, 1952	Griffith	I - 8	159 1/2	↓ 4	155 1/2	10 1/2	145	145	139	
March, 1952	Bumgardner	I - 9	150	-	150	3 1/2	146 1/2	146 1/2	142 1/2	
Totals for billing of March 31, 1952			309 1/2	↓ 4	305 1/2	14	291 1/2	291 1/2	281 1/2	(5) 334 1/2
April, 1952	Griffith	I - 8	44	↓ 18 1/2	25 1/2	-	25 1/2	35	35	
April, 1952	Bumgardner	I - 10	175	-	175	31 1/2	143 1/2	141 1/2	108	
Totals for billing of May 1, 1952			219	↓ 18 1/2	200 1/2	31 1/2	169	176 1/2	143	(6) 210 1/2
May, 1952	Bumgardner	I - 11	197	-	197	44 1/2	152 1/2	136	53 1/2	
Totals for billing of June 6, 1952										(7) 93
Totals to June 6, 1952 billing			1,605	↓ 91 1/2	1,513 1/2	157	1,356 1/2	1,409 1/2	1,221	1,420 1/2
June, 1952	Bumgardner	I - 12	137 1/2	-	137 1/2	110 1/2	27	17 1/2	27	17 1/2**
July, 1952	Bumgardner	I - 13	46 1/2	-	46 1/2	13	32 1/2	32 1/2	32 1/2	32 1/2**
Grand totals			1,788	↓ 91 1/2	1,696 1/2	280 1/2	1,416	1,459 1/2	1,280 1/2	1,470 1/2

Hours claimed worked by employees on terminal billing of July 11, 1952, Exhibit 14C 1,407

Total variation of hours paid, Exhibit 9 and hours entered, Exhibit 15: 147 1/2

*Column 2 - paid less than entered on Exhibit 15
Column 2 ↓ paid more than entered on Exhibit 15

**Time between last interim bill June 6, 1952, Exhibit 14A - 7 and terminal bill July 11, 1952, Exhibit 14C, which is "meshed" in final bill.

Relator's juggling of time doesn't represent the correction of inadvertent errors. When he went to trial on the original Pretrial Order he knew his claim was excessive (R. 29-30), and the Court found it still excessive (R. 13) after Relator reduced it during the trial. This case is indistinguishable from *Tebbs v. Peterson* (Utah 1952), 247 P. (2d) 897, in which also

> "the plaintiff materially changed his testimony with respect to a material and observable fact * * *. The attempted reconciliation of the testimony * * * is palpably absurd * * *. The change of position clearly revealed an unblushing attempt to make a case."

Relator's misstatements cannot be justified, as his attorney attempted to do (R. 30), on the theory that

> "the overall charges in this matter actually total more than the amount we prayed for. We didn't adjust down to it, feeling that we would be bound by the amount that we prayed for $5303. Actually the total charges will come to more than that, when the whole thing is totalled."

Actually, Relator's total claim came to $3999.58, which is $1303.42 *less* than $5303.00 "when the whole thing is totalled."

Relator completely discredited both himself and his records by undertaking, as one Court has said:

> "to toy with the administration of the law and make a mockery of justice. The motive and purpose were clear. No possible explanation for this change of testimony appears, except that the exigencies of plaintiff's case demanded it." *Peterson v. Omaha State Ry. Co.,* 134 Neb. 322, 278 N.W. 561, 562.

Since Relator offered no testimony other than to identify the exhibits analyzed above and appellant of-

fered no evidence as to time because it was not in a position to do so, the trial Court had no logical alternatives but to accept or reject Relator's records *in toto*. It certainly was justified in rejecting them because they were mutually contradictory (see schedules I and II).

In *Magidson v. Driggan,* 212 Fed. (2d) 748, the Court said, at page 759:

> "The testimony of a witness who wilfully testifies falsely may be disregarded unless corroborated by credible evidence."

If the records of the Relator in this case are disregarded, there is no evidence whatever to support the findings and judgment.

The Court found that Relator furnished 1169 hours of his employees' time (R. 13), which is 247 hours less than the lowest figure shown on any of Relator's records, and 111½ hours less than the 1285½ hours Relator ultimately claimed (R. 48, 7). It also found (R. 13) that Relator furnished 774.5 of his own time, which is 103 hours less than the 877½ hours he ultimately claimed (R. 48, 7). This certainly does not represent an acceptance of Relator's evidence; and yet the trial Court had no basis for editing that evidence. It could not and did not, make a selection from among Relator's conflicting records because those records contain no figure or combination of figures which corresponds to the finding.

An indulgent attitude toward the type of evidence offered by the Relator is certainly not warranted. In *Gohlinghorst v. Russ,* 146 Neb. 470, 20 N.W. (2d) 381, the Court said:

> "the trial Court is not required to helplessly sit by and permit a litigant to play fast and loose with the processes of the Court by insisting at different dates under oath on the truth of each of two contradictory stories according to the exigencies of the particular occasion presenting itself. Courts must be vigilant in suppressing such schemes for the procurement of benefits by one to the detriment of another."

If Relator's records have any probative value whatever, it is only as an admission of the injustice of his claim. In *Andrews v. United States,* 157 Fed. (2d) 723, which was a prosecution for possession of forged tire certificates, knowing them to be forged, the Court quoted 20 Am. Jur. Evidence, Section 284, as follows:

> "An attempt to fabricate evidence is receivable as evidence of one's guilt of the main facts charged. Such fabrication is in the nature of an admission, for it will not be supposed that an innocent person would feel the necessity for fabricating evidence."

As a result, there is no foundation for any possible finding except that Relator failed altogether to prove the amount of time he and his employees furnished.

If the Court had any basis for finding that the Relator was entitled to compensation for any number of hours of his employees' time and his own time, it was necessary under Rule 52 (a) of the Federal Rules of Civil Procedure for the Court to make findings sufficiently explicit to give the reviewing Court a clear understanding of the basis of the trial Court's decision and to enable it to determine the ground upon which the trial Court reached the conclusion. *Maher v. Hendrickson,* 188 Fed. (2d) 700, 702; *McGavock v. Giolitto,* 201 Fed. (2d) 685.

In *Dearborn National Casualty Co. v. Consumers Petroleum Co.,* 164 Fed. (2d) 332, 333,

> "The Court made an ultimate finding of fact * * * but no subsidiary findings of fact were made to indicate upon what findings this conclusion of ultimate fact was based. There must be such subsidiary findings of fact as will support the ultimate conclusion reached by the Court. Kelley v. Everglades Drainage District, 319 U.S. 415, 421-2, 63 Sup. Ct. 1141, 1145, 87 L. Ed. 1485."

The finding

> "that Relator furnished labor to defendant James Lundgren at the rate of 774.5 hours of his own time for $4.50 an hour and 1169 hours of his employees' time at $3.75 an hour" (R. 13)

manifestly does not conform to these requirements. See *Smith v. Dental Products Co.,* 168 Fed. (2d) 516, 518.

The rules applicable to this Court's review of the case at bar were enunciated in *Orvis v. Higgins,* 180 Fed. (2d) 537-9, quoted with approval in *Arnolt Corp. v. Stansen Corp.,* 189 Fed. (2d) 5, 10, as follows:

> "Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance."

Certainly, the Court's finding as to the number of hours finds no support in any oral testimony because on this subject there was none. The trial judge's finding must rest exclusively on the written evidence, viz: Relator's mutually contradictory records, which were rejected by the trial Court and which prove nothing but the lack of merit in Relator's claim. Under these circumstances, this Court has not only the authority but the duty to disregard the findings of the trial judge and reverse the judgment. *Waialua Agricultural Co. v. Maneja,* 216 Fed. (2d) 466, 474.

POINT II

THE COURT ERRED IN ALLOWING RELATOR $1,000 ATTORNEY FEES.

The statute under which this cause was instituted provides for the allowance of attorney fees to the prevailing party (ORS 279.516).*

It is well established that the amount of attorney fees should be based, among other things, upon the benefits derived, the amount involved, and the results accomplished. These are three of the eight factors enumerated by the Oregon Supreme Court in the case of *Schmalz v.*

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*ORS 279.516 — "In any action under ORS 279.512 * * * the prevailing party shall recover such attorney fees therein as the Court shall adjudge reasonable."

*ORS 279.512 — "any person who has supplied to any contractor labor or material for the prosecution of the work provided for in the contract referred to in ORS 279.510 (contract with a school district) * * * may institute an action* * * against the contractor and sureties on his own relation, but in the name of the * * * school district * * * concerned, and may prosecute the action to final judgment and execution, for his own use and benefit, as the fact may appear."

Arnwine, 118 Or. 300, 246 Pac. 718. These factors were disregarded by the District Court.

A. Based upon results accomplished, plaintiff was entitled to no more than $540.00 attorney fee.

The parties stipulated (R. 48) that if Relator should "recover the amount originally set forth in the Pretrial Order, $1,000 is a reasonable amount as attorney's fees." The "amount originally set forth in the Pretrial Order" was $5303.79, which was reduced by the Relator as a result of his cross-examination to $3999.58 and was further reduced by the Court in its findings and judgment to $2859.58. Hence instead of recovering "the amount originally set forth in the Pretrial Order" Relator recovered less than 54% thereof. Nevertheless, the Court found that $1,000 was a reasonable attorney fee and awarded that sum to the Relator. This was not only contrary to the stipulation; it would be excessive with or without such a stipulation.

B. Based on the amount involved, plaintiff was entitled to no more than $300.00 attorney fees.

The advisory schedule of minimum fees and charges adopted by the Oregon State Bar recommends a fee on the foreclosure of mechanics' liens of $150.00 where the amount involved is $1,500.00 and $395.00 where the amount involved is $5,000.00.

Cases of the general nature of the instant case in which the amount of attorney fees was passed upon are collected in 143 A.L.R. at pages 838-9. Mechanics' lien foreclosure cases dealing with attorney fees are collected in the same volume at pages 797-8. The amount al-

lowed in all but one of the cases cited in the annotation is far below $1,000.00, although the amount involved in almost all of them exceeds $3,000.00.

C. Every equitable consideration in this case militates against allowance of a fee as large as $1,000:

Attorney fees are allowed in these cases against the surety as exaction

> "for an unjust delay in payment after his liability is ascertained and the debt is actually due from him. Brainard v. Jones, 18 N.Y. 35, as quoted in 1 Brandt Suretyship Guaranty, above; Illinois Surety Co. vs. John Davis Co., 244 U.S. 376, 37 S. Ct. 614, 61 L. Ed. 1206; Dwyer v. U.S. (C.C.C.) 93 F. 616; Getchell & Martin Lumber Co. v. Peterson, 124 Iowa 599, 100 N.W. 550, 552; Holmes v. Standard Oil Co., 183 Ill. 70, 55 N.E. 647." *Goodsteed v. Duby,* 131 Or. 275, 283 P. 7.

The claim of $5,303.79 which Relator asserted (R. 48), was unjust, was known to him to be unjust when made (R. 29-30) and was found to be unjust by the trial Court (R. 16), even after it was reduced by Relator to $3,999.58 (R. 48).

This Court has said repeatedly that

> "the exercise of discretion * * * should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party or some other equitable consideration of similar force which makes it grossly unjust that the winner of the particular lawsuit be left to bear the burden of his own counsel fees which prevailing litigants normally bear." *Faulkner v. Gibbs,* 199 Fed. (2d) 635 at pages 641-2.

The trial Court's decision (R. 16) clearly establishes that the defendant's refusal to pay Relator's demand

was justified. Both Appellant's good faith and Relator's shabby conduct throughout this litigation clearly dictate the allowance of a minimum fee rather than a fee which can only be regarded as in the nature of a penalty assessed against the Appellant or a device to award Relator the amount of his claim* even though it was found to be excessive.

CONCLUSION

There is no evidence to support the finding of the District Court as to the number of hours for which Relator is entitled to compensation.

The basis, if any, of that finding was not disclosed by the District Court as required by Rule 52 (a) of the Federal Rules of Civil Procedure.

Since the only evidence on the subject is Relator's mutually contradictory records, the credibility of witnesses is not involved, and the findings of the District Court are not entitled to any weight beyond what is justified by the cold record. That record does not justify the findings and judgment.

The award of $1,000.00 attorney fees is excessive and contrary to the express stipulation of the parties.

The judgment appealed from should be reversed.

Respectfully submitted,

JUSTIN N. REINHARDT,
Attorney for Appellant, General
Casualty Company of America.

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*The judgment of $2,859.61 plus attorney fees of $1,000 is $140.00 less than the $3,999.58 Relator ultimately demanded, and if costs are included it is $38.00 more.